UNITED NATIONS
ECONOMIC AND SOCIAL COUNCIL

Distr. LIMITED
E/ECA/ATRCU/ARCC XI/90/6
28 April 1990
Original: English

UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA

Eleventh meeting of the Africa Regional Coordinating Committee for the Integration of Women in Development

6-8 May 1990
Libyan Arab Jamahiriya

COMPARATIVE STUDY OF NATIONAL LAWS ON THE RIGHTS AND STATUS OF WOMEN IN AFRICA

TABLE OF CONTENTS

INTRODUCTION

I. Political and Civic Rights

1. Problems of Constitutional Equality de jure
2. Electoral Law
3. Citizenship
4. Legal Capacity

II. Civil Law-Family Law

1. Marriage Requirements

(a) African Customary and Positive Law Requirements
(b) Muslim Marriage Requirements
(c) Christian Marriage Requirements

2. Effects of Marriage on the Legal Status of Woman

(a) Rights to Retain Family Name
(b) The Matrimonial Home
(c) Rights and Duties of Spouses
(d) Property Rights

3. Divorce and Separation

(a) Islamic Law
(b) Africa-General
(c) Effect of Termination of Marriage
(d) Inheritance Rights/Customary/Positive Law Succession

III. Penal Law

IV. Employment and Law

V. Education and Law

VI. Health, Family Planning and Law

VII. Conclusions

VIII. Recommendations

IX. Research Papers on which the Comparative Study has been based

I. INTRODUCTION

It would be wrong and unjustified to try to generalise on the legal 1/ status of women in Africa beyond a certain point. Considerable differences between regions, countries, tribes and communities exist as a result of economic, cultural, religious and political divergencies. The objective of this study was to depict the legal status of African woman using the research materials which have been already developed at ATRCW and the other available documents. Therefore, some selected legal topics have been taken up for the purpose of this comparative study.

The list of case studies on which a comparative analysis was based is not an impressive one but it is believed that the selected cases are representing tendencies prevailing on the continent. However, it has to be admitted that the limited access to certain documents did not make it fully possible to sufficiently justify the adopted generalisations.

It has also to be regretted that the case studies were not based on uniform system which would enable to carry out the in-depth comparative studies of the same legal institution. It has also not been possible to update the legislations to be analysed. Practice and jurisprudence was not, regretfully, taken into account in the case studies, to the extent it should be done, for similar reasons.

In the present study the legal status of African women was described in the light of the constitutional provisions and the very much differenciated legislations related to civil (especially family) law. Some aspects of penal law and labour law problems were taped.

A considerable level of generalisation was assumed at the very beginning when analysis was to be done on the continental scale. This is the inevitable shortcoming but also an advantage of the comparative studies and reviews of different phenomena in a broad scale.

In consideration of the wide objective scope of the study and the comparatively narrow subjective scope at the same time, the sine qua non condition was to observe a respective discipline of depicting the judicial and juridical phenomena and refer to other fields only when absolutely necessary.

Only the conclusions and recommendations in a form of the author's comments are based on a bit wider base.

I. POLITICAL AND CIVIC RIGHTS

1. Problems of constitutional equality de jure

Most African countries have provided in their constitutions the availability of fundamental rights and freedoms to both men and women and have mandated the

---

1/ For the purpose of this study the term "law" shall be used to comprise first of all the constitutions and national legislations (positive law). Significance was also attached to customary (written and not written) law which clearly differs from positive law.

equality de jure for all their citizens which is clearly in line with article 3 of the Convention on the Elimination of All Forms of Discrimination Against Women and paragraph 54 of the Nairobi Strategies Forward-Looking for the Advancement of Women.

Although the Constitution entitles everyone to equal protection and enjoyment of rights under the law, this entitlement must, however, be considered a subject to the protective provisions on discrimination. 2/ For example article 40 of the Nairobi Forward-Looking Strategies for the Advancement of Women. Report of the World Conference of Review and Appraise the Achievements of the UN Decade for Women: Equality Development and Peace, Nairobi 15-26 July 1985 (UN publication. Sales No. E.85.IV.10) Comp. art. 1 of the Zairian Constitution which stipulates that "tous les Zairois, homme et femmes, sont égaux devant la loi et ont droit à une égale protection des lois. Aucun zairois ne peut, en quelque matière que ce soit, faire l'objet d'une mesure discriminatoire, qu'elle resulte de la loi ou d'un acte de l'executif, en raison de sa religion, de son appartenance ethnique de son sex, de son lieu de naissance ou de sa résidence".

Sexual equality is mentioned several times in the text of the Constitution of the People's Republic of Mozambique. Art. 29 of the Constitution states that men and women enjoy the same rights and are subject to the same duties: art. 30 makes active participation in defense the highest duty of every man and woman citizen. In what may be a unique constitutional provision, Mozambique declares the emancipation of women as "one of the State's essential tasks".

Constitution of the Republic of Ghana of 1979 in its art. 19 affirmed that fundamental rights and freedoms of the individual regardless of race, place of origin, political opinion, colour creed or sex, subject to respect for the rights and freedoms of others and for the public interest.

The Constitution of the United Republic of Tanzania of 1977 stipules in the Preambule that..."the Government and all state organs give equal opportunity to all citizens, men and women... and that the country is free from all types of discrimination..."

The Constitution of Federal Republic of Nigeria in its Chapter IV para.39 provides all citizens of Nigeria with the equal rights irrespective of their race, tribe, place of origin, sex religion or political opinion. Similar provisions may be find in the Constitution of Gabon and Rwanda.

According to the Constitution of Swaziland every person in Swaziland is entitled to the fundamental rights and freedoms, whatever his race, tribe, place of origin, political opinions, colour, creed or sex.

In the same time, the Constitution of Morocco in its art.5 guaranties that..." tous les marocains sont égaux devant la loi" and in art.8 that "L'homme et la femme joissent de droit politiques égaux...tous les citoyens majeurs des deux sexes joissant de leurs droit civils et politiques".

2/ The Convention on the Elimination of All Forms of Discrimination Against women, General Assembly Resolution 34/180, annex.

Constitution of Egypt provides that all citizens are equal before the law without discrimination between them due to race, ethnic origin, language, religion on creed. The article 40 refers to public rights and duties and omits sex from the list of bases there should be no discrimination. That has been taken to mean that inequality with regard to private duties and rights is allowed. Discrimination on the ground of sex is also assumed to be allowed by the fact of its omission. Similarly, the protective provision against discrimination in the Zambia Constitution (article 13) does not include sex in the grounds upon which discrimination with respect to payment of tax, matters of personal law, such as marriage, divorce, devolution of property on death and application of customary law. This means that discrimination against women as effected by the income tax act and customary law, for example, is constitutionally sanctioned in Zambia.

Also the Zimbabwean Constitution does not forbid discrimination on the ground of sex, thus permitting gender related discrimination. These being no blanket abolition of sexual discrimination the eradication of this discrimination therefore depends on piecemeal legislation. In this respect four important enactments have been passed 3/. Legal discrimination on the basis of sex is still possible in Zimbabwe because these enactments do not completely bridge the gap left by the constitution. However, in so far as discrimination can be positive or negative, the fact that the constitution allows gender-based discrimination means that one can engage in affirmative action without violating the constitution.

Kenyan Constitution of 1969 also mandates the availability of fundamental rights and freedoms for both men and women (art.70) which is clearly in line with article 3 of the Convention of Elimination of All Forms of Discrimination Against Women. Undoubtedly act 83(3) is central to the whole subject of the implementation of the Convention in the country. The provision allows for discrimination based on sex, while it clearly disallows it on the grounds of race, tribe, colour creed, place of origin, political opinions etc. The position

---

3/ (a) The customary law and primary courts act (6/81) removing the mandatory application of customary law, which is inherently discriminatory against women, from some disputes;

(b) The Legal Age of Majority Act (15/82) giving African women of 18 years and above majority status for the first time in Zimbabwean history;

(c) The Labour Relations Act (16/85) outlawing discrimination in employment on grounds of sex;

(d) The Immovable Property (Prevention of Discrimination Act (19/37) which seeks to eliminate sex discrimination in relation to rights in immovable property.

of women under the Kenya Constitution is made worse by the provisions of section 82(4). It is well established that family laws usually favour men against women and discrimination laws always fall more harshly on women. Some provisions of the article 82(4,5,6) clearly go against both the letter and spirit of article 2 of the Convention 4/.

Since the Constitution serves as the superstructure upon which government legislation and policy rest, the inference that Kenya Government policy condones gender based discrimination is a strong one.

The Ethiopia Constitution of 1987 is an interesting example of the modern approach to the women's problem because it follows more then many other, the line of the Convention on the Elimination of All Forms of Discrimination Against Women. The provisions of art. 35 and 36 of the Constitution state that Ethiopians have equal rights and these are equal before the law irrespective of nationality, sex, religion, occupation, social or other status. The importance of women's problem has been emphasized by the subsection 2 and 3 of art.36 which provides women with a special state's protection saying that.. "The state shall provide women with special support particularly in education, training and employment so they may participate in political, economic, social and cultural affairs on an equal basis with men. The state shall ensure that appropriate measures are progressively taken for women to be provided with health services, suitable working conditions and adequate rest period during pregnancy and maternity".

.. Electoral law

The full participation of women in the construction of their countries and their contribution to the creation of just social and political systems is interlinked with their exercise of the right to vote, stand for election or participate in political institutions.

The act of voting is both a civil right and duty and an expression of involvement in society. Holding elective office as a representative of others is even a more intense form of participation. Although there are differences

---

4/ Kenya Constitution para 82(1) reads in part as follows: subject to subsections 4,5,8 of this section, no law shall make any provision that is discrimination either of itself or in its effect..." art 82(3), in this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection: political opinions, colour or creed. Thereby persons of one such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. art 82(4) subsection (1) of this section shall not apply to any law so far as that law makes provision: (b) with respect of adoption, marriage, divorce, burial, devolution of property on death or other means of personal law, (c) for the application, in the case of members of a particular race or tribe, of customary law with respect to any matter which is applicable in the case of other persons,...

in the form and intensity of voting between political systems, it remains the basic and general political act around which mass participation is organized. The process of electing representative bodies, ranging from local councils through national parliaments, is a tangible way to effect decisions.

In the great majority of African countries women were given the right to vote and to be elected only less than 30 years ago. The participation in vote is optional. It is compulsory in only a few countries, and even then the content of a vote is subject to individual choices. The participation of women in voting belongs therefore to their fundamental political rights and acts of political participation.

In the Africa countries on which information was available, women have the right to vote and to stand to election. The African women, generally, did not face a long struggle to obtain political rights as they did in many western countries. Usually the electoral law is based on Constitution and Electoral Acts. Since the independence these has been universal adult suffrage in most African countries and it oscillates between 18 to 21 for both men and women. For example the suspended 1979 Constitution of Ghana lowered the age of voting and gave the vote to every citizen of Ghana of sound mind and eighteen years of age and over. In Cameroon it is 21. Similar to the Ghanian's constitution provision could be find in Nigeria who has attained the age of 18 years, residing in Nigeria of the time of registration of voters for purpose of election, shall be entitled to be registred as a voter.

The concept of the denocratic system of voting is a very recent phenomenon in Ethiopia. Some constitutions do not mention the age of entitled to vote using only such an expression like full age, all major, legal age, full legal age, having full possession of their civil and political rights etc... Usually the Electoral Acts are more detailed and enact the age as it is for majors.

So, generally speaking the African countries' constitutions mention the equal rights, for all citizens who has reached their major age, to vote and to be elected. But according to some constitutions the offices of state are open to citizens who have already reached a qualified age, which usually oscillates between 21-25 and for the presidents functions 21-40. However, it is not the age which prevents them from participation in election and taking post in political life of their countries. As it has been required in the suspended Ghanian constitution the candidate for the presidential post should be able to speak and read the English language with the degree of proficiency. This requirement discriminated against the 60 per cent of the population who were illiterate and particularly against women who constituted the majority of illiterate people. The Rwanda Electoral Law No 18/1983 requires for example a diploma of the secondary school or equivalent. Thus has excluded a large majority of women from the participation in the political life. In Kenya a candidate for electorial office must be literate in both swahili and English.

Some electoral laws prescribe sums of money which had to be deposited before a candidate could stand for elections to district and city councils, parliament and for president, and these constituted barriers to persons unable to afford such sums. Since women were, as a group, the poorest in the society the financial demands discriminated against them even more.

In summary, the most African countries Constitutions provide that all citizens can vote and be elected as long as they are over certain age (18-20) prescribed by law and have not been legally deprived of this right. However, often a companion to the constitutions, the nationalities laws delineate who may not be a citizen of the country. And often, in this respect it discriminates against women because it deprives them of their nationality if they marry foreigners without similar penalizing men (Mozambique, Gabon).

Although having the legal right to vote and to be elected, the women in Africa are taking very minimal part in the political life of their countries. Despite the legal restrictions (age, illiteracy, money) the traditional causes seem to be also, if not more important. These are as follow: (1) illiteracy; (2) elective politics are difficult, expensive and time consuming, so a number of men stop their wives from getting involved; (3) the responsibility for home and children (4) women believe that politics is men's game.

Since the women do not receive proper information and are not effectively influenced by the media of communication they do not effectively utilise their right to vote. It should be noted that gender equality in political life is only possible when there is full equality, both de jure and de facto.

According to the review of African law pertaining to the political and civic rights there are almost no legal impediments to women's political participation. Yet, in most countries the proportion of women elected to parliaments is small. The percentage of women candidates for office is also small in the countries for which information is available (Rwanda, Gabon, Kenya, Ethiopia). The question is whether, if there were more women candidates for public office, they would be elected and whether women would help elect them. The answer is not a simple one according to available evidence.

3. Citizenship

Citizenship is a basic prerequisite to the exercise of political and civic rights. The most African countries' constitutions provide their citizen with the de jure equality in political life which means ensure them the right to vote and to be elected. However, while looking in to the nationalities laws one could notice that majority of that laws is clearly contrary to the constitutions and the Convention on the Elimination of All Forms of Discrimination Against Women.

The major part of the African countries adopted ius sanguinis of father, citizen of the country as a base of granting the citizenship. Despite the different systems of nationality law in various countries, the role for the African countries' citizenship is not to allow a woman to pass her citizenship to her husband or to her children. For example, under the citizenship of Zimbabwe act 3/1984 a woman who marries a Zimbabwean citizen has the right to be registered as a citizen of Zimbabwe. But a Zimbabwean woman who marries a foreigner man does not have a respective right to register him as a Zimbabwean citizen. Under the same act, a legitimate child born in Zimbabwe from a citizen mother and non-citizen father, who is not ordinarily resident in Zimbabwe, does not acquire citizenship by birth. On the other hand, if the father was a citizen, and the mother was non-citizen (whether or not ordinarily resident), the child could be entitled to citizenship either by birth or descent. Therefore the citizenship of a legitimate child depends on the citizenship of his father, the mother only passes her citizenship to her child if the child is illegitimate.

In addition, under that law, the citizenship of a person adopted jointly depends on the citizenship of the male adopter. The same principle applies to the acquisition of permanent resident status. Therefore, the law clearly discriminates against women. The similar provisions on the citizenship law can be find in the Zambian legislation (art 5-1 of constitution and the citizenship act). The nationalities law of Mozambique in one respect discriminates against women because it deprives them of their Mozambique nationality if, after independence, they marry foreigners, without similally penalizing men.

While looking for another example of the citizenship law, the Botswana Citizenship Act also discriminates against women married to non Botswana men. First she has no capacity to pass Botswana citizenship to her legitimate by descent even when they are born in Botswana. In addition, she has no capacity to influence her husband's acquisition of Botswana citizenship by naturalization.

According to the Citizenship Act of Tanzania (1961 and 1965) somebody could become a citizen (when not born from Tanzanian parents) through registration or naturalization and a person could register if his or her father was citizen other then by descent. The discrepancy in this case is that the mother's citizenship is of no importance. In the same manner a woman who was or had been married to a person who was or had been a citizen of Tanzania is also entitled to be registered as a citizen upon making an application in the prescribed manner. It is difficult to understand why a man should not also be entitled to register as a citizen when married to a woman who is a citizen of Tanzania.

Acquisition of Zambian citizenship is regulated by the constitution and the Citizenship Act. Foreign women married or previously married to Zambian men are, by law, entitled to obtain citizenship by registration provided that they have been resident in Zambia continuously for at least three years. But foreign men married to Zambian women do not have corresponding entitlement to citizenship by virtue of marriage. Such men may obtain citizenship by registration like any other foreigner after ten years of continuous residence in Zambia. Zambian law therefore discriminates against Zambian women married to foreign man because their husbands cannot obtain citizenship on account of marriage. There are current proposals to amend this aspect of law in such a way that foreign women married to Zambian men will not in future be granted citizenship in a period of three years. The proposed law stipulates a similar period of ten years residence in Zambia by foreign men to be granted Zambian Citizenship on the basis of their marriage. The proposed law seems to have been prompted by women's demands to change the existing law so as to remove the apparent discrimination. However, women's demands for change in the law have been aimed at enabling foreign men married to Zambian women to be granted citizenship on the ground of marriage, on the same terms like foreign women to Zambian men. The proposed change will not achieve this goal.

The ius sole as a principle of being granted a citizenship have been adopted by the law of the Central African Republic. According to the provision of article 4 of the law No. 63406, children borned on the territory of the republic, are citizen of the Central African Republic. The Swaziland citizenship law is a somehow combination of ius sanguini and ius sole principle stating that every person borned in Swaziland on or after 6th September 1963 shall, if his father is a citizen of Swaziland and is domiciled in Swaziland, become a citizen of Swaziland at the time of its birth (article 21 of the Constitution), but when looking on art.22 it is clear that in fact it is ius sanguini (from the part of the father) which is a base on which the citizenship is granted.

The citizenship law in Gabon is an example of equality of men and women in granting or changing/loosing the Gabonian citizenship.

As it can be seen from the review of the African countries' nationality laws, the principle is that the citizenship can not be passed by women. Some exceptions are possible when father of a child is not known(example of Rwanda). The review shows that the African countries' nationality laws do not grant women equal rights with men with respect to the nationality of their children as it is required by the Convention on the Elimination of All Forms of Discrimination Against Women. Unequality can be also observed when a woman is married to a foreigner. She cannot pass her nationality to him on account of marriage.

Egyptian law stipulates that children can only take the nationality of the father. In connection with the above a very practical problem had been discovered which was becoming widespread. This relates to the situation in which a number of Egyptian women marry foreign men and, upon divorce, keep the children in Egypt with them. Under the present law, those children have the nationality of the father and may have no access to certain facilities which are reserved for nationals. The National Commission of Women considered this issue and might make recommendations that the nationality law be amended to ensure such children to acquire the mother's nationality. This issue should however be considered in the light of the fact that moslem women are not allowed to marry a non moslem man. But a moslem man can marry a non moslem woman. The fact that Egypt made a reservation to the article 9 p.2 of the Convention on the Elimination of All Forms of Discrimination Against Women, means that it cannot be taken to task for having a law that is contrary to the Convention.

4. Legal capacity

A legal person is any person who is accepted by law as a subject of legal rights and duties. In many African countries, legal personality is practicallly synonymous with physical personality. It is true that for certain purposes within the law of succession unborn children may be treated as legal persons, but only on the condition that the child is eventually born alive.

Legal capacity, however, is an index of status and power, the measure of a person's ability to take decision and perform acts that a court will recognize and uphold or penalize. A woman has full legal capacity when she may legally exercise the maximum amount of power permitted in the society, acting in her own name and without assistance to enter into other legal transactions, sue or be sued. Consequently, all women who have attained the age of majority prescribed by law and are not legally deprived of their rights, enjoy full legal capacity. They have full contractual capacity and consequently can enter into any contract, including a marriage contract, without assistance. They have full proprietary capacity to acquire, own and dispose of any proprietary interest, movable or immovable. They enjoy full locus standi in judicio and thus can sue or be sued, enforce or defend their legal rights. In short, in many African countries women, except those married in community of property and, therefore, subject to the marital power, have full legal capacity and, accordingly, enjoy equal status with their male counterparts.

It must however be emphasized that this only amounts to formal legal equality in status and does not mean that women have equal substantive rights with men.

Generally speaking marriage affects legal capacity of a woman, not only respect to the propriety rights but in the other fields of law: the civil law for example does not in general distinguish only between a man and an unmarried woman. In most African countries (Nigeria, Ghana, Burundi, Zaire) through marriage, by law the husband control's the wife's property, in particular property acquired by her after marriage, and she cannot enter into contracts which would jeopardise the husband's right in such property. In practice she cannot enter into loan or live purchase agreements without the husband's consent: nor can she obtain a passport without such consent.

In some countries marriage however does not effect legal capacity of a woman. For example, part IV of the Law of Marriage Act, 1971 in Tanzania, provides that married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable and the same right to contract, the same right to sue and the same liability to be sued in contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding, and disposing of any property (article 56 and 59). But under customary law the status of the woman is usually that of a minor whereby she is always under the controle of a male: either a father, a brother or a husband. This means that in terms of real property, where this property is communal or clan property, a women has not capacity to exercise ownership rights over it. It should be noted that there is no great difference between matrilineal or patrilineal societies, though the position of a woman is more subordinated and has limited rights in th patrilineal society.

II. CIVIL LAW - FAMILY LAW

1. Marriage requirements

(a) African customary and positive law requirements

When the political and civic rights present a kind of uniformity due to being based on international standards, the civil law and especially the family law presents a mosaic of various systems like positive law paterned often on the Napoleonian civil code, customary law of different tribes, Islamic law and indian law. However, for all those systems, marriage is a universal constitution, recognized all over the continent and deeply rooted in the law of the state and religion. Consequently marriage is the root of the family and society. Each society regulates the marriage governing it. But the law regulating marriage can only retain or possess validity and command if such laws reflect moral values, economic conditions and religious beliefs of the people to which the law applies.

The majority of marriage acts or other kind of legilations acts pertaining to marriage define marriage as a voluntary union of a man and woman intended to

last for their joint lives. It is essential therefore that any union purporting to be marriage must be voluntary. The essence of voluntariness is consent given by each party to the intended marriage 5/. In order that marriage is recognized as lawful it must be a union between a man and a woman 6/.

Essentially there are two types of marriages in Africa, namely monogamous and polygamous. Monogamous marriage is defined as a union between one man and one woman, to the exclusion of all others. A polygamous marriage is defined as a union in which the husband may during the subsistance of the marriage be married to or marry another woman or women.

Polygamy is a customary law institution: hence the incidence of the system is governed by customary law, including islamic law. However, there is no uniform system of customary law prevailing even throughout one African country, thus in discussing marriage under customary law one must always bear in mind that these are of various kinds. Normally one of the distinctive features of customary law is the fact that it is an unwritten law, but this is not generally so today. In many countries customary law is now being written.7/

Generally speaking in African countries four forms of contracting a marriage may be distinguished:

(1) in civil form
(2) in civil form or where both the parties belong to a specified religions, according to the rights of that religion;
(3) in civil form or in islamic form if the intended husband is a moslem;
(4) where the parties belong to a community or to communities which follow customary law;

5/ For example in Tanzania the Act No. 5 of the Law of Marriage Act 1971 stipulates that marriage is a voluntary union of a man and woman intended to last for their joint lives. Similar to that the Ethiopian constitution states that marriage is based on the consent of a man and a woman. According to the article 88 Decret - Loi portant Code des Personnes et de la Famille du 5 janvier 1980 No. 1/1 le marriage est union volontaire de l'homme et de la femme conformément à la loi civil. Similarly the matrimonial causes Decree 1970 of Nigeria a marriage is voluntary union for life of one man and one woman.

6/ Therefore where marriage is of the two same sexes, then it is not a lawful marriage recognized by the law. In northern Tanzania among the Kuria a woman can marry another woman but this type of marriage is not recognized by the law.

7/ For example, in Nigeria, in the Northern states, native authorities are empowered to record in writing any declaration of what, in their opinion, is the native law and custom relating to any part of native law in their area of its authority or a specificed part. Similar provisions exist in western, mid-western and Lagos state.

In the most of African countries there are two types of valid marriage that can be contracted, namely a monogamous marriage under the positive law and a customary law potentially polygamous marriage. Only Africans can contract a customary law marriage, whereas anybody can contract a monogamous marriage under the positive law 8/.

The fact that women who are majors have full capacity means that they can contract marriage without the consent or assistance of their parents or relatives. Therefore, a marriage involving parties who are majors requires only the consent of those parties to be a valid marriage. The first condition to conclude a valid marriage is capacity to contract a marriage, and second is observance of the necessary formalities that are presented by law 9/.

The major marriage acts in the different countries established a minimum age of marriage at the age of majority which is between 18 to 21. But for the special reasons the age of the bride can be reduced. In some country like Tanzania, the marriage act established a minimum age at 15 for the girl with the consent of her parents or 14 years with leave of court. It is worth nothing that in the area of conflict of laws, capacity to marry is governed by domiciliary law, i.e., lex domicilii. A party must have capacity by his domiciliary law to contract a marriage otherwise he might find himself married in one part of the country and not married in another. Therefore, in Tanzania for example, the formalities necessary for the contracting of marriage are governed by the Law of Place of Celebration: i.e. lex loci celebrations.

There is no minimum age for a customary law marriage, but generally the betrothing of girls below the age of 12 is forbidden 10/. But in some countries, a girl can be promised to her future husband even before birth and when she reaches the age of seven or eight her husband builds a house near that of her parents and they begin cohabiting. In other areas girls are married right after puberty as soon as they finish their initiation rites 11/. In all cases, however these marriages are arranged by the families of the future couple, and the girl has no say in the process. Such a law fails to protect girls by allowing them to be married at a very young age.

8/ Compare, Marriage Act cop.37, and 238(Zimbabwe): Matrimonial Causes Decree, 1970 (Nigeria).

9/ For example, in order that a women domiciled in Tanzania should have capacity to contract a valid marriage, the following conditions must be satisfied:
(1) she must be over the age of 15;
(2) she must not be already married;
(3) she must not be related within the prohibited degrees of consanguinity or affinity;

10/ For example in Zimbabwe, in Nigeria.

11/ For example in Mozambique.

The status of women in marriage and their rights to maintenance depend upon the type of marriage contracted by the parties - that is customary or statutory marriage, and that the status of women under the former is inferior to that under the latter. In customary law women are considered perpetual minors in several respects, including marriage. A woman must obtain the consent of her relatives to contract a valid customary marriage regardless of her age. In contrast the women aged the major age and above can contract a valid marriage under the positive law, without the consent of her guardian or relatives.

The requirements for payment of bride-price (lobolo) to validate a customary marriage also underlines women's position as minor. The very fact that bride price has to be paid to the girl's parents or guardians means that they must give their consent to the marriage they will obviously not accept bride-price for a marriage they do not approve of. In this respect, the law discriminates against adult women in denying them the right to marry men of their own choice under customary law.

Bride-price also undermines the status of women under customary law in relation to divorce. In most countries, bride price must be repaid to the husband by the women's relatives upon the dissolution of the marriage. This, therefore, means that the woman has to seek her parents' consent to dissolve the marriage as well.

The bride price is generally no longer a legal requirement for the validity of marriage. However, parties are free to enter into any bride-price arrangements they may wish although such arrangements would have no bearing on the legal validity of marriage. As long as bride-price (lololo) is paid as a part of the marriage transaction, women will continue to be dominated and psychologically oppressed within the institution of marriage. On that example one can notice that changing law does not alter the social inequality of women. In Zimbabwe nobody is obliged anymore to pay lobolo but in reality men of all classes continue to change and pay the bride-price 12/

(b) Muslim Marriage Requirements

Dispite the differences between different schools of islamic law in African countries in which the islamic religion makes 13/ part of the legal systems, all citizens, Moslem and non-Moslem like, have to fulfill three conditions for a valid marriage: the marriage must be registered, secondly, the parties must meet minimum age requirements and there must be free mutual consent between the parties. The average minimum age for marriage for girls oscilates between 15-18 and 18-21 for men. Although a marriage below this age is not void, courts will not conduct hearings on its legal ramification. Finally, the mutual consent of the parties contracting marriage is most important 14/

12/ Report of the women's law in southern Africa, workshop, Zimbabwe 22-26 August 1988, p.48 next (typescript)

13/ For example, the Hanafi school of Muslim, the Maliki school of thought

14/ Law and the Status of Women, an international symposium, ed. by the Columbia Human Rights Law Review, 1977 p.37

A Moslem marriage is a voluntary civil contract entered into between man and women. Islamic law prohibits marriage between a Moslem men and animist women but not a Christian women. However, a Moslem woman is precluded from marrying any person other than a Moslem.

Marriage may not be solemnized between persons who come within the prohibited degrees of consanguinity and affinity (linal descendants and ascendants, brothers, similar relatives of a spouse). There is also a prohibitio arising from fosterage. Marriage is also prohibited between a man and a woman who has been divorced three times by him, unless she has, after their divorce, been married to another person and divorce from him. A muslim woman cannot be married during the period fo retreat (idda) which follow her divorce. The Moslem renegade loses his right to marry.

A Moslem woman can marry only one man at a time while a Moslem male can marry up to four wives. The right to polygamous marriage is subject to two conditions under Islamic Law:

(1) The Moslem man must be just to all of his wives;
(2) The husband must be financially capable of providing for the maintenance of all his dependents in the immediate and extended family.

In any event, the percentage of plural marriages is relatively low in North African countries (Moslem), constituting three percent of the total marriage in Egypt for example 15/

The Moslem procedure of marriage knows the mahr which is a kind of an obligatory gift , paid by the husband and becomes the property of the wife as a result of the marriage contract. It is not a brideprice, but a gift to enable the bride to prepare for marriage.

The wife retains the mahr as her property only by the act of marriage. If it is paid at the time of engagement, it has to be fully reimbursed to the finance in the event of the dissolution of the relationship, irrespective of who is at fault. In the case of the death of either spouse, however, the full mahr becomes the property of the wife, whetner or not the marriage has been consummated.

(c) Christian Marriage Requirements

Marriage in that creed is a religious sacrament, which must be solemnized by a priest according to church rites. In Africa that kind of marriage does not constitute a very significant percentage of all marriages concluded, excent such countries like Egypt and Ethiopia. In the past, the marriage ceremony was preceded by a very elaborate betrathal ceremony that was considered the initial step in performance of the marriage contract. In the Coptic Orthodox marriage the betrathal ceremony has been simplified and is now only a formal promise of marriage, i.e. an engagement, which has to take place in the presence a priest who records it in a register. The financial arrangements concerning the dowry gifts and furniture are decided upon by mutual agreement of the couple.

15/ Law and the Status of Women, op.cit, p.39

The Christian marriage can be solemnised in different way according to various rules of different Christian churches (Roman Catholic,coptic, orthodox etc.) but generally, Christian engagement entails a legal obligation, and the African countries legal system recognize that type of marriage as a legally binded, as it is with the Fetha Negast, applied to Christians of the Ethiopian plateau15/. It is to be stressed that the religion marriages are officially recognized as a legally binded types of marriages by all legal systems either as a separate kind of obligation, or as an additional to the civil ceremony.

2. Effects of marriage on the legal status of women

(a) Rights to retain family name

Taking of the husbands name by the wife is a modern element brought in the African countries by the colonial administration. According to some opinions, it was based on the fiction of oneness of husband and wife and it was a kind of a manifestation of the subordinate position of a women to the effect that after marriage she loses her identity and individuality and adopts that of her husband 16/. It seems that such opinion has already lost the significance. According to the review of the family codes, woman should choose freely to acquire any name she wishes or she should retain her maiden name. However, the practice on that subject is not uniformed in African countries and depends usually on type of marriage.

Generally speaking, an African women married under customary law retains her family name. The husband and his family have the right of naming the children and usually names are given from the husband's family, although where several children are born, some may be named after the wife's relations 17/.

In majority of the African countries there are no laws regulating the right of a woman to use either her family name or upon marriage her husband's name. In Nigeria for example it is accepted convention that a woman on marriage changes her family name for that of her husband. Many educated women, however, find it more convenient to retain their family name for professional life and are known by their husband's for social occasions. Many others have adopted the system of hyphenating their families' and their husbands' name to form a compound name 18/.

15/ Law and the Status of Women in Ethiopia by Daniel Bailu, African Training and Research Centre for Women, UNECA, Addis Ababa, 1980.

16/ Law and Status of Women in Tanzania by Jane Rose K. Kiloba, African Training and Research Centre for Women, UNECA, Addis Ababa 1981, p.39.

17/ Le droit et la condition de la femme au Zaire, N'Kulu Muyobo, UNECA,AA. 1985 p.11.

18/ Law and the status of women in Nigeria, J.O. Debo Akande, African Training and Research Centre for Women, UNECA, Addis Ababa 1979 p.30.

In Kenya, there is no legislative provision that regulates the name the parties should assume after marriage. The prevalent practice in marriages celebrated under the provisions of the marriage act is for the wife to take the name of the husband as her surname, retaining in brackets her maiden name if she so chooses. In customary law, woman retains her maiden name 19/.

Some countries' legal provision, like for example the marriage act of 1971 in Tanzania, are completely silent on one of the areas which is governed by the customs of the people. On the contrary, some countries,like for example Ghana has the law (marriage ordinance) that stipulates that a woman assumes her husband's name and the title of Mrs upon divorce, the husband cannot restrain the wife from using her name although she cannot pledge his credit 20/.

A moslem woman can retain her family name after marriage. On the other hand one can observe that some countries try to reform in their positive law to the customary law. For example in Zaire the Loi No. 73/002 related to the names of person stipulates that according to the custom, a married woman does not take her husband's name and so do not the children 21/.

(b) The matrimonial home

Traditionally it was the right of the husband to determine the matrimonial home and consequently his duty to supply one. This superior economic position gave him the upper hand however, when married under the positive law, the two parties have equal right of choice in the local of the matrimonial home 22/.

Different situation can be observed in the countries where the customary law was incorporated into the positive law. In Zimbabwe for example, at marriage the wife acquires the domicile of her husband and therefore her domicile becomes that which the husband chooses even if they are not living together. So, she loses the capacity to choose a domicile of her own separate from that of her husband and to this extent women are discriminated against 23/. Similarly, under the Zambian law, a married woman cannot acquire a domicile of her own choice as the marriage lasts. A married woman is, therefore, considered a minor trenyhout coverture for purposes of domicile. 24/

19/ Law and the Status of Women, op.cit., p. 100.

20/ Law and status of women in Ghana, Takyiwaa Manuh African Training and Research Centre for Women, UNECA, Addis Ababa 1984. p. 37.

21/ Comp. La loi No. 73/002 in Zaire.

22/ Comp. Zambian marriage Act.

23/ The Legal Status of Women in Zimbabwe, a paper presented ... op.cit., p.9

24/ The Legal Status of Women in Zambia, a paper presented ... op.cit., p.9

In some countries, under customary law a husband and a wife may not always live together. In Ghana, for example, among the Akan and the Ga, a woman does not usually move to her husband's house on marriage but stays in her family house, only going to the husband's to sleep. However, if she refuses to move in with him after he has asked her to, this can be a ground for divorce 25/. This type of residence in marriage may aid instability, although in a situation where the wife is not considered a member of her husband's family, it allows her to stay with her own family and to benefit from its support.

The case of the Ga is unusual because in patrilinear societies marriages are patrilocal and the husband must provide a home. With the process of urbanisation and social changes in urban centres some part of society lost contact with their old family circle. Under these circumstances parties are in a matrimonial home of their choice. The same might be assumed in newly established Ujamaa Villages in Tanzania 26/.

(c) Rights and duties of spouse

Generally, the consequences of a monogamous marriage under the positive law are governed by the general law, excepting that the propriety consequences of such a marriage, if the parties are Africans, would be governed by the customary law 27/. Thus, the rights and duties of the parties inter se and their rights and duties towards their children are obtained by reference to the general law. On the other hand, the consequences of a customary law marriage are generally governed by customary law, except to the extent that customary law has been ousted by the positive law.

Under the positive law husband and wife have the same rights and duties. According to the review of the positive laws of different African countries 28/, the parties also owe each other duties of love, confort and fidelity. The parties owe each other duties of support. This duty of support is not terminated by the dissolution of the marriage but continues into the post divorce period 29/. As to which of the parties should be maintained by the other is a matter determined by reference to the means and resources of each of the spouses. The party who is unable to fully support himself or herself has a right to claim maintenance from the other. However, generally the commission of adultery allows the court a discriminatory power to refuse to grant a maintenance award to the adulterous spouse.

25/ Dinah Azu, the Ga Family and Social Change, Leiden 1974

26/ Law and the Status of Women in Tanzania, op.cit.

27/ See S.13 of the African Marriage Act, Zimbabwe

28/ Examples of Zimbabwe, Zambia, Kenya, Ghana, Tanzania, Mozambique

29/ Zimbabwe example, see S7 of the Matrimonial Causes Act, and Section 13(4)(a) of the Maintenance Act of Zambia.

Despite the equal rights and duties some legal systems stipulate that in case the husband fails to discharge his duty (i.e. to provide a wife with necessities), the wife has an automatic right to sue for separation and a maintenance order, which includes provision of a home as a necessity of life, in addition she can pledge his credit 30/. Where there is a wilful neglect to provide for or maintain the household, the wife can go to court to enforce this right 31/.

(d) Property rights

The matrimonial property rights of women depend on whether they are non-African or Africans and on the system of law under which they are married.

For example, in Islamic Law Marriage a married women has the right to trade with her property, which will not form part of her husband's property. Neither the husband nor the wife are liable for debts contracted by the other. Separation of the husband's and wife's financial liability and property are absolute. In case of a conflict of national laws, the law of the husband's country determines the effect marriage has upon the property of the spouses.

Usually that parties who can only marry under positive law (two non-African or a non-African and an African) have a choice either to marry in community of property or out of that. If they wish to be married in community of property they should execute an antinuptial contract to that effect. In case of marriage without an antinuptial contract the marriage is automatically out of community of property. Where the marriage is in community of property all the property of the spouses fall into a joint estate under the exclusive administration of the husband by virtue of his common law martial power. Under this regime the wife becomes a quasi-minor without locus standi in judicio and contractual capacity. The advantage of this property regime is that the property in the joint estate is divided equally between the spouses at the dissolution of the marriage.

Under the regime of a marriage out of community the property of the spouses remains separate throughout their marriage with each one of them having full powers of administrations over his or her separate estate. At divorce each spouse retains his or her own property. In Zimbabwe, this regime worked untold hardships on most spouses who, throughout the marriage, worked in the home bringing up the family and performing domestic duties. This essential contribution for the welfare of the family was not recognized by the law. However, this inequitable position has been changed in Zimbabwe for example by S.7 of the Matrimonial Causes Act, 33/1985.

30/ Law and the Status of Women, op cit., p. 190. According to some opinions these provisions were relevant during an age when women had no proprietary capacity. Their retention, without amendment to make them applicable, only serves to give women a lower status and to uphold a false image of sexual inequality.

31/ See for example: Ghana Matrimonial Causes Act, S.16(1), Kenya Penal Code, ch.63, s.39.

The property rights of African spouses whether married under the positive law or customary law are very often governed by customary law which means the community of property. Under the customary law all the property, acquired by the spouses, except the personal goods, belong to the husband who is entitled to retain all of it at the dissolution of the marriage 32/. At divorce under customary law the wife is often entitled only to her personal goods and nothing more than a handful of kitchen utensiles.

However, this general view on the property rights, should be seen with many restrictions. In some countries, like Ghana, there is no significant difference between property rights under customary and positive law. There is no community property between spouses, and each is entitled to acquire property and to use it. Whatever a wife acquired before marriage belongs to her separately. While she cohabits with her husband whatever she acquires by her own efforts belongs to her. She can be set up in trade by her husband and the initial money may be by way of advancement or a gift. In Ghana, the married women's property ordinance, which sought to grant married women the right to own and control property in their own names, was superfluous since under customary law women have always had this right 33/.

The law in Kenya is that married women are protected by the married women's property act; S.17 of the act provides that married women is to be considered a femme sole in matters affecting her property 34/. Section 11 provides married woman with security of tenure in matrimonial homes and the right to benefit from the husband's assets. These rights may also be enjoyed by husband, therefore, the act incorporates a measure of equality.

Unlike women married under customary law, generally speaking, women in the positive law marriages are also entitled to a share in the matrimonial property. This includes the husbands property, or property jointly acquired, or property acquired with the contribution, direct or indirect, of either spouse, during the marriage 35/.

The review of the property right's system shows that rights in marital property are directly linked to the relationship between the spouses and depend on the legal system on which the marriage is based. Usually, in the supervisor/inferior relationship that presently exists under the customary law, the husband holds all the family's property. Men generally insist on controlling not only their own salaries, but also their wife's if she works outside the home. The positive legal regime concerning the property right is usually more generous for women however there is still very few implementation of that regime in practice 36/. There is need for research to determine precisely the position of women in this legal dualism system regarding ownership of wages and property

32/ Le droit et la condition de la femme en République Centrafricaine, UNECA/ATRCW, 1986, p. 6

33/ Law and Status of Women in Ghana, op.cit.,p. 7

34/ Law and Status of Women, op.cit., p.191

35/ See for example in Zambia, Law Reform Act (Miscellaneous Provisions) Section V

36/ Law and the Status of Women, ...op.cit., passim.

acquired with them. It seems that customary law may change to adopt to changing socio-economic conditions in society, and there is some evidence at this 37/. The idea that property should be controlled jointly by husband and wife should be reinforced. All property acquired after marriage by means of the labour of the spouses, whether professional or domestic, becomes a part of the family's community property and each of the spouses has the right to use and administer this property, even if one spouse stays at home to care for the children and the house and earn no salary. To give the value to domestic labour is extremely important. Because of the law's educational function such a provision will not only make men aware that they should value their wife's participation in family life but also help women to improve their self-image and overcome their sense of inferiority.

3. Divorce and separation

(a) Islamic Law

Generally speaking a marriage contract under Moslem Law can be dissolved in one of three ways: (1) by the husband at his will and without the intervention of a court (and this power can be delegated to his wife), (2) by mutual consent; (3) by judicial decree through annulment or dissolution.

A moslem man has a right to divorce his wife through repudiation and if he repudiates his wife three times a divorce is effected. The majority of moslems are for the restriction of this unilateral right of the man.

However, the right of divorce can be delegated to the wife by her husband, when it is so stipulated in the marriage contract. The divorced wife is entitled to alimony during the period of idda, which means the time when a women must remain in seclusion and abstain from remarrying. (The duration of idda is usually three months or until delivery in the case of pregnancy). In the case of a revocable divorce or repudiation the women is entitled during the idda period to all the rights of a legal wife, including rights to maintenance and inheritance. If her husband desires to take her back before the end of the idda, a new marriage contract will not be necessary.

Divorce, whether by repudiation or judical decree, gives the wife the right to an alimony for the duration of one year. In the case of failure to pay, the alimony can be recovered by court decree through seizure of the ex-husband's property or of one-quarter of his salary if he is a government official.

In the divorce by mutual consent, a wife may pay a certain sum to her husband as a means of compensation in order to obtain a divorce from him.

A marriage is declared void if contracted in violation of prohibitions designed to further public order or in violation of the ordinance of the religious affiliation. In addition, a moslem marriage may be annulled in the following circumstances:

37/ Women's law in Zambia, op cit., p. 53; Mozambique: Women, the law and Agrasion Reforms, Barbra Isaacam, June step han, UNECA, ATRCW 1990.

(a) a marriage contracted on a temporary basis for exchange on agreed remuneration;

(b) if it could be proven that the marriage has damaged the social and moral prestige of the family of the wife;

(c) a marriage contracted with the insane or feeble minded person whose gardian allows him to marry,

(d) a marriage contracted for the sole purpose of removing the marriage prohibition which exists between a man and a woman who was divorced three times by him.

A moslem wife has the right to ask for the dissolution of her marriage by judicial decree on the following grounds:

(a) failure of the husband to pay for his wife's maintenance. Such a divorce is revocable, however, if the husband decides to pay the maintenance before the end of idda,

(b) existence of a serious defect or ailment in the husband;

(c) damage to the wife on moral or social grounds or as a result of her husband's absence or imprisonment.

(b) Africa General

Until very recently divorce was not possible for large groups of peoples. In patrilinear and muslim societies only the man was permitted to initiate a divorce or separation and a woman had no such right. Because women were not considered legal persons under customary law, they could get divorced only if their patrilineage would represent them. Because the lineage did not want to return the bride-price, a women's relatives almost always counseled her to stay with her husband, even if she were badly mistreated, and, when wives runaway to their parents they were often sent back to their husbands. Thus, most women who wanted to end their marriages were forced to run away from their husbands, and they often ended up as prostitutes in urban areas or as a wage laborers working at menial tasks for almost no money.

Despite the fact that there is a tendency for women to marry for security many women found themselves in untenable maritable situations. For example, a number of women in Mozambique who participated in the armed struggle returned to their villages after independence only to find that they had been married in their absence to man they did not know 38/.

38 / Mozambique: women, the Law and Agrarvion Reform...,op cit,p.53

However, when it comes to divorce of a couple married under customary law, the procedure is relatively simply. Both families meet and negociate, and depending on the circumstances, it is returned what was taken at the marriage ceremony. The aim of customary procedure is termination of the marriage in the most satisfactory way for all concerned. Almost the only matters ever in dispute are whether the marriage was properly contracted in the first place and the manner in which jointly acquired property will be divided. Usually divorce under customary law may be followed by remarriage. It must be noticed that a wife is not entitled to maintenance upon divorce or separation under customary law.

Customary marriage is usually characterized as a marriage which is capable of being dissolved without any limitations imposed by a rigid set of grounds for divorce. This is definitely quite true for all customary marriages with some exceptions. For example, the Oromo customary marriage in Ethiopia is a union for life in theory and practice 39/

Almost the all African legal systems recognize the separration of spouses when marriage has broken down, and usually separation can be obtained judicially or by agreement 40/. Once parties are separated they are released from the duty to cohabit although they are still legally married. Separation agreements should always include terms of maintenance, division of matrimonial property and custody of children. Separation may be a step to a divorce or may be maritorious in that they give a chance to parties to cool off. Separation agreement terms can be varied if there are changes in circumstances and a separation agreement is discharged if one of the parties repudiates one of its terms or if parties resume cohabitation or where a divorce decree is obtained.

Divorce is termination of marriage. The major positive law provision stresses that a marriage can only be dissolved by death or by a judicial decree. It is very difficult to compare the very different systems of law pertaining to divorce even if they are often based on French and Anglosaxon legal systems. The review of the various legislations shows that there are two types of divorce that based on the mutual consent of the spouses and that sought by one spouse through litigation.

39/ Law and the Status of Women in Ethiopia op cit., p.14

40/ Compare art. 174-175 du code civile Zairois livre 1er, Ghana Law of Marriage Act 1971, S.99,67. Nigeria Matrimonial Causes Decree 1970, S.39 & 40. Kenya separation and Maintenance Act S.3 gives women the exclusive right to seek judicial separation and maintenance. The Act gives women grounds for judicial separation that are not available to husbands like: alcoholism of the husband: he has contracted veneral disease; he has subjected her to prostitution: he has been convicted of a crime for having caused her actual bodily harm by causing her to take noxious substances, by unlewfully wounding her, or by assaulting her, or he has failed to provide the necessities of life to her and her children: he is found guilty of rape, sodomy, or bestiality.

A party may petition for divorce on the ground that the marriage has broken down. Matters which may be taken as evidence of the breakdown of marriage are usually adultery, sexual perversion, cruelty, wilful neglect, desertion for last 1 3 years, imprisonment (the term of imprisonment is different for various countries from 1 year to life imprisonment) mental and other illness alcoholism 41/. The court may accept any number of matters as evidence that the marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree.

In all divorce proceedings of either type there must first be an attempt at reconciliation. Litigious divorce proceedings can sometimes also be used by a member of a non-registered union who seeks judical recognition so that the court can then regulate division of property, child custody, and the food allowance 42/.

(c) Effect of termination of marriage

When marriage is dissolved rights and duties between spouses cease. Dissolution of marriage terminates the marriage contract and all incidents arising out of the contract and parties are seteased from all duties towards each others.

The two most important problems which must be resolved upon marriage are the division of the common property and the custody of children generally speaking a husband has no further duty to maintain his wife nor has the wife a reciprocal duty to her husband, save only and unless the court for special reasons so directs 43/. The statutary basis of awarding alimony does not exist in mostly legal systems. Therefore, a woman who has been wholly a housewife may face extreme financial hardship and the law should have at least made some provisions for those who have been totally devoted to the upbringing of the family after all the majority of women in Africa fall into this category owing to the fact that they do not have any wage earning occupation to their credit. This shows us how important is the problem of division of the common property.

As it was mentioned above matrimonial property regimes vary from the typical customary law system under which the wife has no individual right to own property to the legal separation of the property of the spouses. The first pattern is more or less typical for the patrilineal society, the second is common among the matrilineal people. Some of course, steer a middle course between these two extremes. Keeping the wife's property distinct, while others believe that wives should be allowed to keep their own earnings for themselves. However, it should be noticed that some governments try to enact special provisions in favour of women married under customary law that are usually deprived of resources after divorce. This inequitable customary law was one of the reasons the Zimbabwean legislature enacted section 7 of the Matrimonial Causes Act which empowers the

41/ See for example: Tanzania Law of Marriage Act 1971 S.107,Decret - Loi portant code des personnes et de la famille du Burundi, titre VII, Code civile Zairois, livre ler· le droit et la condition de la femme en Republique Centrafricaine, op.cit, p.30 - Ghanian Matrimonial Causes Act.

42/ Mozambique.., op.cit., p.53

43/ Comp. in Tanzania Law and Marriage Act 1971, S.115, (1); in Kenya Subordinate Courts (Separation and Maintenance) Act. Laws of Kenya Ch.153 but for example in Zambia, women married under the Act Matrimonial Causes Act 1973 are entitled to maintenance on divorce. The High Court is given extensive discretionary powers to order one party to maintain the other on divorce.

courts to equitably divide and reallocate the property of the spouses at the dissolution of their marriage by divorce and this applies to the dissolution of all marriages in Zimbabwe. However, it should be noted that the powers of the court under section 7 are exerciseable only at divorce and not at the dissolution of a marriage by death. The similar steps have been taken in Zambia 44/. But since compensation to the wife on divorce is not a traditional rule, no compensation would ordinarily be expected to be ordered against a husband by a traditional forum when dissolving a marriage 45/.

Usually, the re-allocation of property after divorce under statutory law is done by the court which should have regard to all the relevant circumstances of the case. Especially the court is directed to have regard to the income, assets, financial needs and obligations of each of the spouses, the standard of living of the marriage, and the direct and indirect contributions made by the spouses to the welfare of the family. In some legal systems like in the Central African Republic 46/, the matrimonial property is divided into three parts after the divorce. The personal items are returned to the spouses, and the third, common part which constitutes of goods achieved during the marriage is divided between the both parties. In some countries the provisions of the positive law pertaining to the reallocation of property refer to the customary law in this subject which usually is discriminatory against women 47/.

Generally, according to the traditional way of dealing with children, once paternity was determined custody would follow the customary principles in most cases, depending to which lineage the child is considered to belong muslim children always belong to the father. He is not exempted from his duty unless it can be proven that he is financially unable to perform it in which case the maintenance obligation devolves on the male next of kin. The father maintains his sons if they are minors and his unmarried, widowed or divorced daughters irrespective of age. When the parents are separated, the mother has the right and duty to take custody of the children until the respective ages, which may be extended by the courts to 9 years for boys and 11 for girls. The alimony paid by the father to the children of the broken marriage should include a remuneration for the nursing services of the mother. After ataining these ages the children are given to the case of the father who is responsible for their later education and welfare in his capacity as their natural guardian.

44/ Zambia Matrimonial Causes Act, S. 5

45/ Women's Law in Zambia..., op.cit., p.19

46/ Le droit et la condition de la femme en République Centrafricaine, op.cit,p.36

47/ See: Le droit et la condition de la femme au Zaire, op.cit p.18, le jour dur divorce, la femme se trouve dans l'impossibilité d'apporter la preuve de la propriété d'un bien dont on a lui a fait croire qu'il lui appartenait, pas plus que la preuve de son apport à l'acquisition des biens du menage..Cette situation merite une attention particulière de la part du legislateur car les femmes sont tellement persuadées de la communauté de bien... qu'elles ne pensent pas à s'entourer de garanties. Il est donc regrettable que le projet de nouveau code de la famille n'ait pas tenu compte de cette situation... Il est par ailleurs nécessaire de développer l'information des femmes en cette matière".

The children of a mixed marriage in which the father is a moslem must follow their father's religion, especially since they inherit his property.

In matrilineal societies children's guardian is the mother's brother, and in partilineal groups, they belong to the fathers lineage. Moreover, if the children go with their mother, for whatever reason, the father usually feels no responsibility to help support them. The above principle relates first of all to the customary law. The positive law's provisions are often based on the French and Anglo-saxon systems of custody and differ from the provision of customary law which does not usually refer to the principle of the welfare of the child 48/. In the positive law generally custody may be divided into physical custody and legal custody. The physical (actual) costody refers to the physical possession or care and control of the child, while legal custody entails all rights, powers and duties of a parent over a minor child other than just physical control. In other words, legal custody involves the exercise of such important powers as control of a child's education, the choice of religion, the administration of the infant's property, power to veto the issue of a passport, giving of consent to the infant's marriage and right to receive the bride-price on the marriage of a child under customary law.

Zambia is a very interesting example of trying to modernize the customary law of custody making it in line with the positive law of custody. The principle applied in custody in both systems give customary law wives almost equal chances of being awarded custody of their children which makes a significant step to eliminate discrimination against women. The Zambia example shows that the women's rights in this respect are indeed further enhanced by the decisions of the High Court extending the positive law principle of the welfare and interest of the child, to custody of children born to unions governed by customary law as well. According to this principle, the custody of the child, both legal and actual, is given to the parent by whom the welfare and interests of the child will be best served 49/.

(d) Inheritance rights (customary/positive law succession)

The law of inheritance in the countries where the political and legal system is based on islamic law, the muslim system is applicable to moslem and non moslem alike. In the other countries it applies only to the muslim society. Under muslim law a man or a woman has the right to dispose of one-third of his or her property by a testamentary will. A central principle of the inheritance law is that when there are male and famale heirs, the female's share is onehalf the male's, however, the right of testamentary disposition may be exercised to provide female heirs a greater share of the property.

Under the prescribed division of property, a widow is entitled to one fourth of the estate of her deceased husband if her husband has left no children. If he left a child, she is entitled to one-eighth. If he left a daughter and no son, the daughter is entitled to one-half of the estate of her father. If he left both sons and daughters, they are residuaries in the proportion of two shares to a son and one share to a daughter.

48/ Compare in Tanzania Law of Marriage Act S.105; le droit et la condition de la femme en République Centrafricaine, op.cit., p.39; Mozambique, op.cit., p.54. Law and the Status of Women in Ethiopia, op.cit., p.15.

49/ Women's Law in Zambia, op.cit., p.3

Also in non-Muslim countries women are still faced with limitation as far as inheritance and law which is applicable makes a discriminatory distinction between males and females and the equivalent shares they are entitled to receive at inheritance and disposition. In most of African countries rights to inheritance may be acquired through either testate or intestate succession generally, under the various bodies of customary law, there is no distinction between male and female under a testamentary (by will) disposition, and it is quite possible to grant women rights by will to which they might not ordinarily be entitled. In Nigeria for example, although a man may not validly make a gift of land to his wife during his life-time, he may do so by testamentary disposition 50/.

There is also virtually no difference between the sexes in the matter of their rights of inheritance under a testamentary disposition. Although it has been said that in some tribes traditionally some items of property must not been inherited by women 51/.

Since it is impossible to find a general pattern in customary law on the issue of the intestate succession, it is therefore more convenient to base following considerations on the assumption that a common pattern can be found among the patrilineal and matrilineal major ethnic groups in Africa.

Within matrilineal groups maternal relatives nowadays feel it their right to seize a deceased man's property even personal property, dispossessing his wife and children,without making provision for them, as is traditionally desirable. Succession, like descent, is reckoned through the female line. Sometimes the situation is more complicated when matrilineage and patrilineage part company like it is for example with Akan in Ghana. 52/ since the children of a male member do not belong to his matrilineal group, they do not succeed him.

Generally among the patrilineal tribes women do not normally inherit land from their deceased father owing to the exogamous nature of the marriage and patrilocal residence. For example, in Tanzania Rule No. 1 of the Local Customary Law (Declaration) Order, No. 4(1963) declares that property rights are vested in the male line what means that property rights of females are only derivative from the male. The inheritance is categorized in three degrees and daughters are grouped in the third degree consequently receiving the least of the property. The position of widows is not happy one either. A widow has no share of the inheritance if the deceased left relatives of his own clan and she is only entitled to be cared for by her children just as she cared for them. A childless widow is in a better position because she is given a share of the movable and immovable property acquired by law the courts usually affirm laws which are not equitable during the marriage. The plight of widows is still neglected by the legislature. In many tribes once the husband dies the relatives of the husband make a claim to all the property and children of the deceased and the wife is usually driven away by the greedy relatives. Her only redress is to

---

50/ Women's Law in Zambia, op.cit., p.43

51/ Law and the Status of Women in Nigeria, op.cit., p.44

52/ Law of Succession Act, S. 29.

turn to the law courts but owing to the inconsistency of customary law women and widows often do not seek relief from the courts. The position of widows is a serious matter to be resolved by the majority of countries' legislation, especially in terms of giving woman the freedom to bring up her children, when these children have already lost one parent. A woman widow should have right to be a guardian of her children.

Some limited changes have, however, been noted in last 10-15 years in some countries to give widows some rights to inherit the husband's property, especially where they are left with small children to care for. It has been noted as well that there is a shift from matrilineal to patrilineal systems of succession, to the benefit of the deceased persons children, including daughters 53/.

The absence of a written will does not make it meaningless to distinguish between testate and intestate succession. The disposition by will is not very popular, probably because of the superstitious belief that the making of a will fastens the maker's death, or that if property is not shared according to the rules well-known in the community, the spirit of the deceased would visit with evil whoever might have been responsible for the deviation from customary law 54/.

When a marriage contracted is under statutory law, the applicable law of succession is the general (positive) law of the state in which the parties are domiciled. For example in Nigeria, according to the statutes of distribution, if a man dies intestate leaving a widow and issue the widow is entitled to one-third of his personal estate and the remaining two-thirds is distributed in equal proportion among his issue. If, however, a man dies without issue, the widow is entitled the one-half. The only inequality is in respect of making the father but not the mother succeed where there is no issue. On the basis of the provision, however, a wife gets definite rights to her husband's property. The status of distribution make no differentiation between female and male children and they also grant to the widow rights of succession but the common law of England which is applicable when a marriage is celebrated in any other way that in compliance with the Marriage Act, or outside Nigeria, does not give any rights at succession to realty in respect of females. In some countries women are still treated as a minor by the positive law even if she should be treated equally, with man according to the constitutional provisions. In Kenya the widow is placed on the same footing as children in terms of inheritance. Both are treated as "dependents". Where the intestate has no children, the positive law provides that only certain minimum protections be given the widow. At least she is entitled to all personal and household possessions of the intestate and she is given a life interest in the remainder 55/.

53/ Women's Law in Zambia, op.cit., p.43

54/ Law and the Status of Women in Nigeria, op.cit., p.44

55/ Law of Succession Act, S.29

There is serious doubt about the practical effectiveness of existing legal rights in the enforcement of property rights when a husband dies. In most cases, although a widow might be entitled by law to much of her husband's property after his death, in practice she can still be dispossessed of it by her husband's kin claiming to be entitled to it under traditional customary law. In practice, very few widows seem to benefit from the legal rights to property conferred by the common law and the statutory law.

III. PENAL LAWS

Although the majority of African countries' constitutions provide their citizen with equal rights and state that men and women are equal before the law, the penal laws are in some respect discriminatory against women 56/.

In penal matters, the law applied in most countries is entirely written, usually based on British or French systems. In Muslim countries the penal laws are written as well 57/. However, the social climate which is the product of custom, exerts a decisive influence on the scope and effective application of penal provisions. The provisions of articles 337 and 339 of the Penal Code of Togo are a good illustration of this 58/. Veronique Dagadzi wrote for example in her paper that as far as it can be traced in the archives of the law court of Lome, no decision condemning the adultery of a husband can be found, but those concerning adultery of women abound. This is explained by the fact that most Togolese customs have no concept of male adultery. A wife convicted of adultery is liable to three month to two years imprisonement while a husband, under the same condition only fined from some money 59/.

The Kenyan Penal Code treats women in some respect as a minor. Section 19 of the Penal Code, provides that a husband is criminally responsible for all criminal offences committed by his wife, excepting treason and murder, providing that the crime was done in his presence and under his coercion. Similar provisions can be found in Nigerian criminal code. The wife of Christian or statutory marriage is not criminally responsible for doing or omitting an act which she is actually compelled by her husband to do or omit. A husband and wife of a Christian marriage are not criminally responsible for a conspiracy between themselves alone. Also, where husband and wife of a Christian are living together, neither of them incurs any criminal responsibility for doing or omitting to do any act with respect to the property of the other. Each are criminally responsible for any act done by his or her. But while living together, one can initiate criminal proceedings against the other. All these provisions seem to indicate an acceptance of a higher status for women who contract an essentially monogamous marriage.

Another issue related to the practice of picking up unaccompanied women found in streets andpublic places. This is done under the auspices of the

---

56/ Como. code penal marocain. Art. 40 stipules: "le meurtre, les blessures et les coups sont excusables s'ils sont commis par l'époux sur son épouse ainsi que sur le complice à l'instant lù il les surprend en flagrant délit d'adultère".

57/ See supra

58/ Adultery is covered and punished under articles 337 and 33 of the Penal Code. It is legally defined as sexual relations between a married person and a person who is not his or her spouse. Relations against nature are not considered as constituting adultery.

59/ Law and the Status of Women op.cit., p.301

Vagrancy Laws and with the stated objective of protecting the morals of society. It is only women who is arrested and, of late, a number have been subjected to tests for venereal diseases. Prostitutes are usually harassed by police on the grounds that they are idle and disorderly persons under section 178 of the Penal Code or under section 173(d) of the Code as a rogues and vagabounds.

The existing penal laws generally, do not distinguish between all citizens in the protection of their property, freedom, reputation and personal safety. However, in conformity with prevailing social mores, there are some special provisions which govern women, like rape, adultery, abduction, defilement, indecent assault, insulting the modesty of a women.

Adultery has a civil as well as a criminal aspect. Civil proceedings in most cases assume a quasi criminal nature. Even in matrimonial proceedings adultery could be instituted as a criminal conversion and the standard of proof was so high that it required proof beyond reasonable doubt, as opposed to proof on a balance of probabilities which is a standard required in a civil case. Even customary law regards usually adultery as a quasi-criminal offence.

Generally, adultery is not a criminal offence under positive law, but it is an incident for divorce and entails tortious liability, i.e. damages for pecuniary loss and wounded feelings or loss of honour. Previously, in most countries the action for damages against an adulterer or seducer or enticer could be instituted by a man only against a person who has seduced his wife or daughter. Only recently has it been made possible for women to sue an adulterer and also claim damages 60/.

The most heinous offence that may be committed against a woman is rape. It presents both substantive and procedural problems for women. The substantive problem is with the definition of rape. The procedural problems relate to evidence admitted in a rape trial and publicity surrounding that trial. Other problems with regard to rape are not strictly legal ones, but relate to the treatment of rape victims by the criminal justice system and by society.

Yet vulnerable women, particularly the poor and powerless, are often the victims of sexual exploitation in the form of what is popularly called 'jobs for sex" or other sexual pressures. In order to be guilty of rape, the accused must usually know that the victim is not consenting or act recklessly with regard to whether or not she consents 61/. Law usually leaves it open to a man to argue that although any reasonable man would have been aware that the victim was not consenting, he subjectively believed that she was. The law should be reformed to punish those who force a woman to submit to sexual intercourse in circumstances where a reasonable man would have realised that the woman was not consenting. Although there are laws to deal with such offences but as usual the intricacies of law enforcement have proved rather inadequate and a failure in certain instances. The courts lack the approach required for such serious cases and what is more, ambiguous technicalities are sometimes applied which result in defeating the purpose of justice 62/.

60/ Comp. in Tanzania, the Law of Marriage Act, (1971), in Nigeria Matrimonial Causes Decree (1970)

61/ Comp. Nigeria Criminal Code (S.6) Legal situation of Women in Zimbabwe, op.cit., p.60

62/ Law and the Status of Woman in Tanzania, op. cit., p.19 and next.

Defilement is a version of rape which involves a female who is under the age of fourteen and is not the wife of the agressor, or is an idiot or imbecile. In cases of defilement the law is more concerned with protecting young girls from being morally abused and corrupted and it should be immaterial whether that girl is a virgin or not. In cases of defilement age usually must be proved whether by document such as a birth certificate, or otherwise, what sometimes may create a big problem. Ceases of defilement face the same limitation as the cases of rape above, mentioned.

Another crime which is mostly punished by penal law is the indecent assault: generally, any person who unlawfully and indecently assoultes any woman or girl is guilty of a felony, and is liable to imprisonment any person who with intent to marry or caraly know a woman of any age, or to cause her to be married or cannally know by any other person, takes her away, or detains her, against her will. It is to be noticed that very few cases are taken to courts for the above crimes. This is a laxity on the part of the women as they have learned to acquiesce in the case of such insults.

Prostitution in itself is not an offence and it is very rarely when law gives a definition of the concept. However, prostitution as a social phenomenon is closely related to the other offences known by penal laws. Most writers and researchers associate prostitution with marriage and assert that unequal marriage and social relations led to this trend. The inferior position of the woman and her position vis à vis the man were, and still are, an acute contradiction in society 63/. Considering also the status of women in society it is not possible for them to break the bonds of matrimony and expect to go back to their parents and be warmly received, therefore the only course left to them is prostitution. Economic motives drive a woman to prostitution especially in the society where all means of production are controlled by man. Owing to the technical difficulties involved in sexual offences, prostitution per se is not an offence and it becomes a punishable offence only if a person lives wholly or partly on the proceeds of prostitutions 64/, or she is a disorderly person, rogues and vagabounds, produce immoral acts etc.

IV. EMPLOYMENT AND LAW

Attitudes and prejudices regarding the employment of women are strong and are shared even by women themselves. Although legal provisions exist to give equal opportunities to female employees, the enforcement of these provisions is extremely weak. Since women form the majority of unskilled workers, and the level of skill determines the wage, most women do not receive high salaries. The majority of salaried female workers are in teaching, nursing, secretarial and clerical work where salaries tend to be low and opportunities for promotion and training are limited. Women constitute a smaller proportion of the population seeking employment but they are less likely than men to find work because of the limited employment facilities for all workers. Women are at a disadvantage

63/ Law and the Status of Women in Tanzania, op.cit., p. 7, Kenyan Penal Code, S. 18?, 183

64/ Ibidem. p. 8

because of their lower educational attainments and lack of skills. Where both males and females have the same qualifications, employers tend to have greater faith in a man's ability to cope with an emergency situation and to stand the strain of busy periods. Employers complain of frequent maternity leaves, necessitating the employment of replacements, and the high rate of obsenteeism caused by maternal and domestic responsibilities.

Generally, in Africa, employment can be subdivided into three different sectors: the modern, the traditional subsistence and the intermediate sector. For women, the nature of work, the conditions of employment, the remuneration, the degree of worker protection under the law and the problems of combining work and home responsibilities varies significantly in these subsectors. As it results from the review of the available documents and research papers, speaking about employment means usually participation in the wage labour force. This definition, therefore, excludes unpaid family workers, in either rural agricultural settings or in an urban environment, and disregards the invaluable services of housevives thus excluding the vast majority of African women. However, it should be stressed that the African women, whether they are in rural or in urban areas, perform the most tedious and backbreaking work.

Generally, women are legally ensured of equal rights to men regarding employment and wages is very often guaranteed by the constitutional provision or in special employment act 65/. Sometimes, even the constitutional norms refer to the special support which shall be done for women's employment 66/. The national labor laws usually deal equally with men and women while at the same time provision is made for the health of women, maternity protection as well as minors protection, which is in line with the ILO Convention, especially No. 100, No. 111, No. 89, No. 35 (ILO Convention 111 which requires sexual equality in terms of access to vocational training, to employment and to particular occupations, as well as in the terms and conditions of employment; ILO Convention 100 which mandates that men and women workers receive equal remuneration for work of equal value ILO Convention 89 on nightwork; ILO Convention 45 on underground work). These conventions, which have been incorporated by several African countries' legislatures were intended to be protective and progressive in their effect, preventing women from being exploited and exposed to danger in heavy industrial and night work.

However, it can be noticed, that in some countries, women do not want to be a subject of a special protective provision concerning work. For example the Botswana Women, participated to seminar held at the University of Botswana, expressed their dissatisfaction with the provisions which prohibited the employment of women in underground mines and the government policy on maternity leave 67/. Most participants felt that the option should have been left open for women to individually decide whether or not to seek employment in underground mines rather than to impose an absolute prohibition upon them. A similar

---

65/ Comp.Art.12 and 13 of the Marocco Constitution, Art. 37 and Art. 12 of the Constitution of Zaire; CAP 51 of the Laws of Zambia Employment Ordinance. Cp.366 in Tanzania; Art 7 of the Constitution of Mozambique; the Labour Relations Act in Zimbabwe, Act 16/85; Employment Act, S.7 of Kenya.

66/ For example, the Constitution of People's Democratic Republic of Ethiopia Art 36. p.1

67/ Women and the Law in Botswana, Report of the Proceedings of a Seminar held at the University of Botswana, 3rd to 5th July 1987 p. 25-26.

approach has been presented by women in Mozambique. In Tafala Province some have been hired as miners in the mines and this was heralded as an achievement of women in their liberation struggle 68/. It seems that women should be properly informed of the origins of the prohibitive provisions. Especially it should be stressed that the exclusion of women from employment in underground mines was not a result of any discrimination against women but results from the health protection reasons. For the same reasons women are to be excluded from heavy work during their pregnancy.

Generally, only women who are employed in industrial and similar undertakings are protected by the provisions of the labour laws. The labour laws usually do not protect the large percentage of women in rural areas made household heads of protect them in a very limited way 69/.

The most extensive legislation affecting women workers relates to maternity and child care. Usually the labour laws provisions grant women a payed maternity leave (from 4 to 8 months) payed fully or some percentage, before and after giving birth, without prejudice to their normal holiday leave, dispensation from night work until sometime after birth with the right to interrupt work for sometime during each working day in order to nurse their children 70/.

It should be noticed however, that the majority of the legal provisions related to the women's position at work, concern only a very minority of African women, especially them who work in the public sector. There are several obstacles preventing women from fulfilling their responsibilities adequately both as workers and as wives/mothers and it is not worth to repeat it again, they can be find in every book or study dealing with women problems 71/. What is perhaps needed more is a more definite statutory access for women to education and training. Efforts to achieve equal position on the workers market must be made on both legislation and education/information level. And the next step in the future should be made through collective bargaining between labour unions, employers and employees.

V. EDUCATION AND LAW

Again the law does not overtly discriminate against women/girls but in reality women are very often the victims of discriminatory practices in the education field. The majority of African countries has granted free and fully access to education (at least at two first levels) for both sex. For example, the Education Act of Zimbabwe provides that no child should be denied an education. The person responsible for ensuring that a child is educated is the parent of such child. The similar provision can be found in the education act of 1961 of Ghana which provides that every child who has attained the

---

68/ Mozambique: op. cit., p. 113

69/ Comp. Kenya-Employment Act, No. 7/1976, Rural Labour Code in Mozambique Art. 225-228

70/ See, Employment Ordinance, S.35 (3) in Tanzania; Decret No. 37/76 in Mozambique; Labour Relations Act, S.13 in Zimbabwe; Law and the Status of Women in Ghana op.cit.; p 56. Art 139-145 Code du travail in Zaire; la loi du 27 juillet 197 in Morocco; the Employment Act (Amendment) No. 18 of 197 in Zambia.

71/ See attached Bibliography.

school-going are shall attend a course of instruction in a school recognized for the purpose, and any parent who failed to comply would be fined up to some amounts of money. Also in Tanzania the Education Act made it compulsory for every parent to enroll every child who has reached school age and it became obligatory for a parent to ensure the continuous and regular attendance of a child at school otherwise a parent might be prosecuted. In addition,a parent who interrupts the education of his daughter in order to marry her off faces criminal court and the groom faces the same consequences. In some countries the equal access to education has been guaranteed in constitutions and sometimes even recognized as a duty 72/.

The problem is not one therefore of right to education but of access to it within the existing structure of society. Generally, despite the fact that the population in African countries is over 50 percent female the figures of students in educational institutions from primary through to tertiary levels reflect the prevalent attitude that the education of girls is less important than that of males. Girls are forced to leave school as the result of pregnancy, and although some do manage to complete their education many fall by the wayside 73/. Girls are sometimes discouraged to enter the university by a special provision requiring them to work for 3 years after national service of one year like it was decided in Tanzania according to the Musoma Resolution (1975). Thereafter they could be enrolled into the university but most of them would be married and family life would interfere with their higher education.

Of course there must be a radical change in the enrolment of female students in educational systems. Girls are not encouraged, particularly in co-educational schools to take science subjects and are usually directed into following those courses which are seen leading to the traditional female supportive role occupations rather than the traditional male oriented professions.

However, some changes have been done to compensate women for their so far low position in education. For example, in Mozambique women are being encouraged to participate in specific short-term technical training courses, such as the 11 month course for low-tension electricians sponsored by the Ministry of Labour 74/. Similar tendencies can be observed in Morocco, Zaire, Ethiopia, however, it has to be noticed that most of the vocational training benefits women in the urban areas, and since the majority of women/girls live in the rural areas, ways and means by which such education can be made relevant to the working life of the rural women must be devised.

72/ Comp. Art 31 of the Mozambique Constitution; Art.36 of the Constitution of People's Democratic Republic of Ethiopia Art. 18, 20 of the Constitution of Egypt. Egypt was one of the first signatories of the UN Convention Against Discrimination in the Education of Women; Art. 13 of the Constitution of Morocco; l'ordonnance 66-66 du 31 mars 1966, Republique Centrafricaine.

73/ Comp. Law and the Status of Women in Tanzania, op.cit., p.60 women and the Law in Botswana, op.cit., p.19.

74/ Mozambique: Women, the Law and Agrarian Reform op.cit., p.99

VI. HEALTH AND FAMILY PLANNING AND LAW

As can be seen from review of the studies on women and the law, in majority of African countries there are no public health legislations although a law exists to regulate the operation of private clinics, hospitals, maternity homes and pharmacies. Some countries' constitutions have even established the ground for adequate and proper care service, however such law usually have not been enacted 75/. Sometimes the legal provisions pertaining to the health service and discriminatory against the poorest part of the society which usually means women. Its meager benefits are legally restricted to the higher salaried classes and can be realized only by a minority of urban dwellers 76/.

Generally there are no laws ensuring adequate maternal care and the provision of pre natal and post-natal clinics are grossly inadequate. No doubt that one of the most important aspects of the women's rights is control over their own reproduction and their health. All that is very closely related to the African countries populations problems which seem to frustrate other efforts aimed at raising the social and economic standard of societies. Family planning programmes have been set up in the majority of countries, however, they have not had much of impact. Suspicions have been voiced about whether the objective of the programmes was to plan or control the population and that these programmes seem to have originated from foreign impetus and influences. In the same time the majority of countries recognized the needs for spacing births to protect the health of the mother and child. There are no legal obstacles in enacting the family planning in majority of African countries and both governments and voluntary organizations have provided family planning services. However it should be noticed that most clinics realising that programme are in urban areas, whereas 60-70 percent of the women who need the services live in the rural areas. The situation is more complicated by the fact that due to the economic crisis in Africa women's standards of living and health have been declining in recent years, therefore some women are likely to invest in more children to safeguard their old age.

It should be mentioned that health practitioners often refuse contraceptives to young girls unless they can prove that they have their guardians' consent. This is not a legal requirement as it is not a legal requirement to get a husband's consent for his wife to obtain medical treatment. In customary law a woman was traditionally required to obtain her husband's consent for all major activities including a medical treatment, contraceptives etc. However, with the laws of majority which have been adopted by many countries this permission would no longer be necessary.

75/ Comp. 1979 Ghanaian suspended Constitution. A positive example can be taken from Mozambique: see Art 16 of Constitution and Socialization of Medicine Law.

76/ Comp. Kenyan National Hospital Health Insurance Act (1966)

Associated with the issue of family planning is the question of abortion. Generally, the abortion is prohibited in most of African countries, except in the circumstances provided by law, which could be specified in following group reasons:

- to protect the health or life of the mother;
- when it is known that the child will be born deformed or congenitally abnormal;
- Serious threat of permanent impairment of the mother's physical health;
- when there is a reasonable possibility that the foetus is conceived as a result of unlawful intercourses 77/.

An attempt to abortion is usually prohibited as well. The problem of unsafe, illegal abortion is a serious one in African countries and it is a common opinion that one step towards eliminating the problem would be to change the law pertaining to this issue and it is aligned along three main approaches: the restrictive, the intermediate and the liberal. The restrictive approach is much concerned with the protection of the potential human life. The intermediate approach places emphasis on guarding the woman against health hazards and is therefore in favour of legalising abortion subject to several limiting. Conditions, including making it available only to married women and carried out in clinical conditions. The liberals' prime concern in that a woman should be master of her own fate.

Before the discussion is brought to the legal provisions, the only way to resolve this problem, all agree, is through the proper education and the widespread availability of family planning devices. And this would be a task of ministries of health to prepare the technical materials. The dissemination of such information should be handled by ministries of education, information and the national and international mass media.

VII. CONCLUSIONS

- This study clearly shows that Africa represents every shade of law and status of women. There are countries in which a woman irrespective of her martial status can own and manage property in her own right, sue and be sued in her own name and she has full legal capacity. There are also however countries where a woman has no locus standi in judicio i.e. she cannot appear in court without permission or assistance of her husband or the male relative.

- A big number of African states' constitutions provide for sexual equality. However they all have the similar problems of constitutional rights being abrogated by customary and/or religious laws and practices.

77/ Comp. Egyptian Penal Law, 58 of 1937 and articles 160, 161, 163 of the Penal Laws. Zimbabwean Termination of Pregnancy Act 29/1977; laws of the Federal Republic of Nigeria 1958, vol.II, cap.42; laws of Northern Nigeria 1963 cap. 89; Tanzanian Penal Code S.150, 151, 152, 230; In Mozambique, according to the law inherited from the Portuguese abortion is illegal under all circumstances when in Egypt for example the moslem legal authorities agree that the decision of abortion is the right of the woman and should not be subject to government legislation; see law and status of women op.cit., p.49 Comp. also Kenyan Penal Code S.158. It is to be noticed that the all above circumstances cannot necessarily be found in each of the above mentioned legislatures.

- Most African governments have little trouble accepting and supporting the idea of equality de jure. However, major problems arise with regard to equal rights for men and women in the context of family law.

- The equal rights are being implemented and enforced slowly and are often overridden by custom. There are some countries in which retrogressive steps still exist or even have been recently taken in the areas of citizenship. Most countries have provisions that a woman who marries a foreigner loses her own citizenship to acquire that of the husband. It is even more serious for the children of those marriages.

- In almost all African countries, the domicile, residence and nationality of the family are determined only by the male part. It should be stressed that the rights related to that guaranteed by constitutional provisions are abrogated by practices, customary law of religions based laws and traditional attitudes. Another example arising from the field of labour laws shows that despite having right to work woman who are married cannot actualise this if the husband refuses his permission on the basis that he is head of household. This list could go ad infinitum

- As it arises from the study, despite the many laws which exist, African women cannot enjoy their rights as full equal citizens. Given the pluralism in the law, they have to confront a complicated legal system, difficult access to the courts, and many strong social and cultural pressures.

- The Zambian experience looks like a very promissing one. It shows that customary law can be adopted and take into cognizance changes in contemporary African society. The Mozambique experiences show that the changes in legal system can go very far. Mozambique proceeded to adopt a unified legal system as opposed to the plural legal systems in other countries.

- Owing to the Convention on the Elimination of All Forms of Discrimination Against Women some progressive changes have been taking place in specific areas affecting women but the changes have been made piecemeal and incoordinated. Therefore one end up with a situation in which the potential advance in certain area is negated by lack of change in another intricately selected area.

- Changes in women's legal status demand a multifaced approach. Some issues lend themselves to changes in the discriminatory rules in order to facilitate changes in the social situation. In others, the social situation changes but relevant laws lag behind, so laws would have to be brought in line with the reality.

VIII. RECOMMENDATIONS

- There are similar fields of law as needing reform despite the differences among the countries. Among these are changes in civic law (citizenship's problem), in family law pertaining to marriage including minimum age for marriage, polygamy, property and inheritance rights, divorce, alimony and child support. Other areas include provisions for family planning, labour law, pension benefits, credit and insurance eligibility.

- Admittedly changes to tradition and custom have to be undertaken cautiously and if possible gradually. It should be a movement not only to improve the body of customary law but also for evolution of a modern legal system, which will clearly define the extent of the rights of women. All law should be a reflection of the social consciousness of people who live under it and changing social, economic and political conditions will inevitably affect the legal order.

- When passing new legislation all possible care should be taken to ensure that it implies no direct or indirect discrimination so that women's right to equality is fully respected in law.

- Governments that have not yet done so are urged to sign the Convention on the Elimination of All Forms of Discrimination Against Women and to take all the necessary steps to ensure its ratification or their accession to it and to implement its provisions. The important issue is to have an environment which is conducive to the effective utilization of all human resources and to the enjoyment of human rights by all - women and men.

- Appropriate bodies should be specifically entrusted, in all countries, with the responsibility of changing modernizing or repealing outdated laws, keeping them under constant review and ensuring that their provisions are applied without discrimination. Wherever necessary, legislation should be enacted or updated to bring national laws into conformity with the relevant international instruments. Adequate provision should also be made for the enforcement of such legislation.

- African women need to be helped to a full understanding of their rights. The legal education should be included in the general curriculum of secondary schools.

- Appropriate curricula on the role and status of women should be developed and included in both formal and informal education on law, from the early stages so that children do not grow up with sex-streatypes. The subject of women's legal status should be included in the regular curricula of Faculties of Law in African countries.

- African women because of the high illiteracy rate and the low level of education have a particular problem with understanding legal provisions and interpreting the law. Efforts like those of the Public Law Institute of Kenya to set up mobile Legal Clinics in the rural areas need to be given support and assistance. Legal provisions need to be translated into the local languages and distributed to all parts of the countries. It also needs to be simplified and short case stories using local situations would be helpful. TV and broadcasting could be also used.

- Great attention needs to be given to sanction and/or remedies that can use in case of violations of their rights. Legal aid schemes would go a long way in making this right a reality. Where such schemes do exist, they need to be strengthened so that they have enough personnel and offices in the rural areas.

- The advisory and training services should be provided to all African countries that request them to bring national legislation into conformity with international standards (role of the ECA).

African countries need comprehensive information on existing international standards pertaining to the status of women and policy measures based on the analysis of current discriminatory legislativeprovisions and practices in the social, economic and political spheres (provided by the UN system).

- ECA should organize seminars on the national, regional and international levels for the legal and paralegal personnel to make them aware of the rights of women.

- ECA with the NGOs support should organize seminars for governmental staff responsible for implementation of international instruments pertaining to women's legal status. African countries should be encouraged to share their experiences among them in the application of international instruments as they pertain to women.

- Similar seminars should be organized for members and staff of Law Reform Commissions in the countries to familiarise them with the process of the implementation of the Convention on Elimination of all Forms of Discrimination Against Women and the implementation of the Nairobi and Arusha Strategies goals.

- NGOs and women's groups can play a great role in promoting wider implement ation of the legal instruments pertaining to women. They should concentrate on simplifying and translating the legal provisions and disseminate it as widely as possible.

The constant research on national and international levels is required to determine and evaluate the real situation to suggest ways of strengthening the position of women de jure and de facto. It is also required for suggesting ways of achieving a commonunderstanding of women's legal status in the society.

- There is a need for what could be termed political education of women. There is a particular role for non-governmental and non partizan organizations and women's network in this. The use of mass media to dramatize the role of women in the electoral process and in the formulation of issues and policies can be a vehicle for achieving their increased participation.

RESEARCH PAPERS ON WHICH THE COMPARATIVE STUDY WAS BEEN BASED

Comparative perspectives of Third World Women, the Impact of Race, Sex & Class, ed. by Beverly Lindsay, Praeger, (1980).

Law and the Status of Women. An International Symposium. Centre for social Development and Humanitarian Affairs, United Nations. Ed. by the Columbia Human Rights Law Review. Columbia University School of Law, (1976).

Law and the Status of Women in Nigeria, by I.O. Dele Akande, UNECA/ATRCW, Addis Ababa (1979).

Law and the Status of Women in Ethiopia, by Daniel Failu, UNECA/ATRCW, Addis Ababa 1980.

Law and the Status of Women in Ghana by Nalvivian Manuh, UNECA/ATRCW Addis Ababa 1984.

Law and the Status of Women in Tanzania, by Jane Rose K. Kilopa, UNECA/ATRCW, Addis Ababa 1981.

Law as an Element of Mechanism Conditioning Development. Some Remarks, by Maria Magdalene Konig, in "Africa, Asia, Latin America", Warsaw 1987, vol.35.

Le Droit et la condition de la femme au Zaire, par N'Kulu Nuyabo, UNECA/ATRCW Addis Ababa 1985.

Le Droit et la condition de la femme au Maroc par Amina Messaoudi Bouari, UNECA/ATRCW, Addis Ababa 1981.

Le Droit et la condition de la femme en République Centrafricaine, Addis Ababa 1985.

La situation legal de la femme au Burundi, par Viburaco Liberata, CEA/MULPOC/Gisenyi/VI/VII/ 3, 1983.

Legal situation of Women in Zimbabwe. Paper presented to the Workshop on Women's Law, Harare 1- 6 August 1988 (typescript).

Marriage and Divorce in Islam. An Appraisal, by Zeenat Shoukat Ali. Jaico Publishing House, 1987.

Mozambique Women, the Law and Agrarian Reform, by Barbara Isaacman, June Stephen, UNECA/ATRCW, Addis Ababa 1979.

Outline of the Legal Status of Women in Zambia. Paper presented to the Workshop on Women's Law, Harare 1 - 6 August 1988 (typescript).

Women and the Law in Botswana Report of the Proceedings of a Seminar held at the University of Botswana 3rd to 5th July 1987. (ed. Daphne Hatlelka).